(4)

No. 97-1992

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

VAUGHN L. MURPHY,

Petitioner,

v.

UNITED PARCEL SERVICE, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

SUPPLEMENTAL BRIEF FOR RESPONDENT

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SUPPLEMENTAL BRIEF FOR RESPONDENT

The Brief for the United States and the Equal Employment Opportunity Commission ("EEOC") as Amicus Curiae agrees with Petitioner and Respondent that certiorari should be granted on the first question presented in the Petition, *i.e.*, whether the definition of "actual" disability under 42 U.S.C. § 12102(2)(A) requires an assessment of impaired individuals in their medicated or unmedicated state.

The Amici brief further suggests the following new question for certiorari, pertaining to the separate issue whether Petitioner could be "regarded as" having a disability under 42 U.S.C. § 12102(2)(C):

> Whether an employer that terminates an employee solely because it believes the employee does not satisfy physical criteria established by a third party such as a government regulatory body could be found to have terminated the employee because the employee was "regarded as having" a disability within the meaning of 42 U.S.C. 12102(2)(C).

Amicus Br. at (I). Respondent UPS[1] believes certiorari is not appropriate on the latter question, or on any other question that could be raised based on the record in this case pertaining to the "regarded as" provision in 42 U.S.C. § 12102(2)(C).

ARGUMENT

Certiorari is inappropriate on the second question identified in the Amici brief for the following reasons: (1) there is no basis for reversing the holding of the

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[1] Pursuant to Supreme Court Rule 29.6, respondent states that its parent corporation is United Parcel Service of America, Inc. Respondent has no non-wholly owned subsidiaries.

Tenth Circuit on the "regarded as" issue; (2) the question presented by Amici was not set forth in the Petition or fairly included therein, as required by this Court's Rule 14.1(a);[2] (3) as Amici acknowledge, the unpublished opinion in this case "does not create a cognizable conflict with any decision of any other court of appeals" (Amici Br. at 18); (4) there otherwise is no conflict in published court of appeals opinions on the "regarded as" question identified by Amici; (5) as implicitly demonstrated by Amici's inability to cite a single lower court decision addressing or deciding the proposed question, there is no significant relevant body of law on this question in the lower courts; (6) the question proposed by Amici relates to a particular aspect of this case that does not have general application to other ADA cases, because it concerns the interpretation, application and effect of specific regulations and medical criteria issued by the Department of Transportation ("DOT") on the certification of persons with high blood pressure to drive commercial motor vehicles; (7) one principal argument advanced by Amici -- *i.e.*, that the DOT medical criteria at issue are only guidelines, not requirements -- is contrary to the record in this case, where it is undisputed that under the DOT medical criteria "in order to be physically qualified to drive a commercial motor vehicle [other than a temporary three-month certification] an individual must maintain blood pressure less than or

[2] Petitioner's "Questions Presented" did not cite 42 U.S.C. § 12102(2)(C), and stated a far different question pertaining to the "regarded as" issue. The fourth question presented in the Petition seeks review of an alleged dispute of material fact: "Whether there was no genuine dispute whether UPS regarded Mr. Murphy as disabled and fired him because of his hypertension." Pet. at (i). Petitioner's one-paragraph argument for certiorari on this question is entirely different than the argument for certiorari advanced in the Amici brief. *See* Pet. at 7-8.

equal to 160/90;"[3] and (8) Petitioner should have challenged the determination that he did not meet DOT requirements by pursuing the administrative appeal process established under DOT regulations (*see* 49 C.F.R. §§ 386.13, 391.47), not by seeking Supreme Court review.

The Tenth Circuit's holding that UPS did not "regard" Petitioner as having a disability is consistent with the uncontroverted facts, the applicable case law, and even the compliance manual and regulations of the EEOC. The "regarded as" provision applies when employers act upon "archaic attitudes, erroneous perceptions, and myths." *Wooten v. Farmland Foods*, 58 F.3d 382, 385 (8th Cir. 1995); EEOC Compliance Manual (CCH) § 902.8(f) (1998) (employer action "as the result of myths, fears, stereotypes, or other attitudinal barriers . . ."). The Tenth Circuit properly held that UPS acted not upon myths or fears, but upon the fact (which is incontrovertible on this record) that Petitioner's blood pressure exceeded the mandatory 160/90 DOT standard. *See* Pet. App. 5a.

Even accepting *arguendo* Amici's assertion (which is contrary to the undisputed record in this case) that the DOT standard is a "guideline" rather than a "requirement," there would be no basis for granting certiorari or reversing the Tenth Circuit on this issue. It makes no difference whether an employer acts upon a DOT requirement or a DOT guideline. In either case, the em-

[3] C.A. App. 54, 297. Petitioner argued in the trial court that this fact was more properly considered an issue of law, but he expressly conceded that the DOT medical criteria required that "an individual must maintain blood pressure less than or equal to 160/90." *Id.* Petitioner did argue below that he had obtained DOT certification and that UPS improperly applied the medical criteria, but those fact-bound arguments were properly addressed by the trial court and provide no basis for certiorari.

ployer is not acting upon "archaic attitudes, erroneous perceptions, and myths." *Wooten*, 58 F.3d at 385.

Additionally, any discretion that may exist under the DOT guidelines would necessarily be vested in the individual(s) responsible for making the certification decision, not in the courts. Because Petitioner never raised below the issue framed by Amici, the record in this case is inadequate to permit this Court to determine whether and how any discretion that may exist was exercised by the relevant decisionmaker(s). And in any event, the federal courts are not the proper forum for reviewing a decision not to certify a particular individual (regardless of whether that decision was mandatory or discretionary). Instead, as noted above, the DOT regulations establish an administrative mechanism for challenging such determinations (*see* 49 C.F.R. §§ 386.13, 391.47), and Petitioner chose not to exhaust his administrative remedies by availing himself of that option. Amici cannot inject into the case at this late stage an issue that should have been pursued through administrative channels before this case even commenced. Amici effectively ask that the Supreme Court of the United States substitute for the Director of the DOT Office of Motor Carrier Research and Standards on the question whether Petitioner should be certified to drive commercial motor vehicles.

Certiorari also is not warranted on the ground that the "regarded as" disability provision of 42 U.S.C. § 12102(2)(C) may relate in some way to the proper construction of the "actual" disability provision (42 U.S.C. § 12102(2)(A)) which is at issue in the first question presented. The Court can consider the significance of the "regarded as" provision as it relates to the "medicated versus unmedicated" issue under the rubric of the first question, without also addressing the entirely separate and distinct "regarded as" question that Amici seek to raise -- a question that would have limited application due to the unusual facts of this case and the particularities of the DOT standard at issue.

CONCLUSION

The petition for writ of certiorari should be granted only with respect to the question whether the existence of a disability under 42 U.S.C. § 12102(2)(A) should be determined on a "medicated" or "unmedicated" basis. The petition should be denied with respect to the "regarded as" provision of 42 U.S.C. § 12102(2)(C) and all other issues.

Respectfully submitted.

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January 4, 1999